



REPUBLIC OF KENYA

N THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, SHAH & LAKHA JJ.A)
CIVIL APPEAL NO. 30 OF 1998
BETWEEN

EDITH WAGITHI CHIIRAAPPELLANT

AND

REBECCA WANGUI GICHUHIRESPONDENT

**(An appeal from the ruling of the High Court of Kenya at
Nairobi (Mr. Justice Githinji) dated the 26th day of
April 1996 in
H.C.C.S. NO. 467 OF 1991)

JUDGMENT OF THE COURT

Edith Wagithi Chiira (Edith) is the administrator of the Estate of Naftali Rumuru Chiira (Naftali) who died on 4th October, 1990. Grant of letters of administration in respect of the Estate of Naftali was made to Edith on 22nd July, 1991 and the grant was confirmed on 11th May, 1992. As a result of that confirmation, Naftali's property land parcel L.R.209/7705 known as Blue Eating House, and situated in the Industrial Area of Nairobi was distributed to Edith, Charles Mwangi Chiira (Charles) and Cyrus Munene Chiina (Cyrus) as tenants in common in equal shares that is to say, Edith, Charles and Cyrus became owners thereof as tenants in common in equal share. Charles, the eldest son of the deceased, died on 25th January, 1995. Rebecca Wangui Mwangi (Rebecca) obtained a limited grant of letters of Administration ad **colligenda bona** to collect, get in and receive the estate of Charles, on 24th November, 1995 and thereafter filed an application in the superior court, in Succession cause No. 467 of 1991, seeking the following orders:

- 1.To restrain Edith from collecting rent in respect of Charles' (one-third) share of the said property.***
- 2.To render accounts for rent.***
- 3.That she be allowed to collect Charles' share of rent.***
- 4.That motor vehicle registration number KAB 586 P be released to her.***

Edith took up a stand to the effect that Rebecca was not properly or at all married to Charles and that therefore neither Edith nor her child could inherit the estate of Charles. She admitted that Charles was intending to marry Rebecca in 1993 and that they cohabited together from May 1993 to October, 1994 when Rebecca left Charles only to come back to Edith's house on 27th May, 1995 after Charles' death.

Rebecca, who is educated up to Form IV, came to Nairobi in January 1991 and stayed at Buru Buru Phase 1 with her brother Peter Wambugu Gichuhi. She met Charles in 1991 and they became friends. She said that at Charles' request she took him to her parents as he wanted to marry her. Charles introduced Rebecca to his mother. On 21st December, 1991 there was a meeting to discuss the issue of dowry. This meeting was held at the house of Rebecca's father in Mukurweini and according to Rebecca, Charles, Edith, Mwangi Thuo, Bernabus Gitubu and his wife were present at the meeting. So were Rebecca's parents, her brothers, her aunts and uncles and some villagers. The talks relating to dowry lasted for about one and a half hours. After she consented to be Charles' wife, she was told she would henceforth be staying at Blue Eating House Nairobi, where Charles was staying. On that day, she said, a sum of Shs.7,000 was paid as dowry to her father and that the balance of Shs.3,000 was paid in November, 1994. She returned to Nairobi and lived with Charles in a two bedroomed unit at Blue Eating House. She gave birth to a child named David Maina - on 27th May, 1993. The child was named after the grandfather, Rumuru. David was baptised on 7th May, 1994 and the ceremony was captured in photographs which were exhibited in the superior court. Rebecca helped in collecting rent for rooms in Blue Eating House which were rented to occupants. The birth certificate of David shows Charles as the father, fully named as Charles Mwangi Rumuru. Rebecca's name is shown as the mother of the child.

This judgement will refer to several Kikuyu vernacular terms and it will therefore not be out of place to set out the meanings in English. We do so now.

Mwati-Ewe

Hariba -A small he -goat.

Njohi ya njurio -Beer for asking the hand of the girl.

Mwati na Harika -Ewe and he -goat.

Mwati ya kiria -Ewe slaughtered to signify completion of marriage payment.

Uthoni -Relationship between parents of parties marrying arising as a result of betrothal.

On the day Charles died Rebecca was not living with him. Charles was a heavy drinker. The cause of death was put as "cardiorespiratory arrest, left ventricular failure and septicaemia"

The ceremony of 'engagement' at Mukurweini where dowry was discussed and part payment made, was witnessed by Bernard Githuibu Njogu who said the sum of Shs.7,000 was to represent 'Mwati', Hariba and elders' liquor for the betrothal of Rebecca to Charles. He confirmed that a portion of the sum of Shs.7,000 was accepted as part of the dowry. Inspector David Muiiri Ndungu gave evidence to the effect that Edith had moved Rebecca's belongings out of Blue Eating House, to a house in Kayole Estate, after Charles' death, to protect the son of her son and their possessions.

Dr. Kigundu Githaiga was present at the betrothal ceremony on 21st December, 1991. He deposed that the sum of Shs.7,000 for the dowry was not considered enough by Rebecca's side. However, the rest of the dowry was agreed to be paid later, on which occasion a church wedding was to take place. This never took place as Charles died as a result of excessive drinking of alcohol.

Edith confirmed being present at the said betrothal ceremony. She also confirmed the giving of Shs.7,000 but for "knowing the home". She said she could not have gone there empty handed. "What happened on 21st December, 1991 cannot be a marriage", she said. Rebecca was chased away by Charles in October, 1994. They were quarreling many times. Rebecca returned after death of Charles and she chased her away. The reasons she gave for chasing Rebecca away were that she did not look after Charles when he was sick and that she was not obeying her. Edith also confirmed that the child was named after her husband who was called Rumuru. So the real dispute to be resolved in the superior court was whether or not a Kikuyu customary ceremony of marriage took place between Charles and Rebecca.

The learned judge considered carefully and at length, the issue he was called upon to decide. He went into the essentials of a valid Kikuyu customary marriage as set out by Madan, J (as he then was) in the case of Zipporah Wairimu V. Paul Mucheru, H.C.C.C. No. 1280 of 1970 (unreported), but referred to in Cotran's Casebook on Kenya Customary Law. The learned judge considered the four important ceremonies and the legal consequences attendant upon the carrying out of the four ceremonies namely:

Offering of "njohi ya njurio" by the boy's parents to the girl's parents after the boy's parents approve the proposed marriage.

Payment of "mwati na hariba" on the day following the ceremony of "njohi ya njurio"
"Mwati na hariba" symbolizes the "uthoni", that is marriage relationship between the parties. A couple may start living together as husband and wife after payment of "mwati na hariba" and before payment of dowry. The couple may beget children who are named per Kikuyu custom, and such naming entitling the children to inherit from their parents. Payment of dowry after marriage does not invalidate a marriage or putting it in another way such payments can be made after the marriage. There is no time limit for performance of the 'ngurario' ceremony and may be performed even after the couple's children are grown up and even married and that 'ngurario' gives the marriage final sanction of validity.

Having thus considered the essentials of a valid Kikuyu Customary marriage, the learned judge concluded that Charles and Rebecca were, on the evidence before him properly married according to Kikuyu customary practice. He was of course fortified in his conclusions by the following undisputed facts:

- 1. That a ceremony was held on 21st December, 1991 at the home of Rebecca's parents.*
- 2. That this ceremony was held at the request of Edith.*
- 3. That the ceremony was attended by Rebecca's parents, relatives and villagers.*
- 4. That there was a feast before discussions started.*
- 5. That before such discussions started Rebecca and Charles were called and each publicly declared their wish to marry the other.*
- 6. That discussions were then held after which Shs.7,000 was paid by Edith.*
- 7. That after the payment Charles and Rebecca cohabited and begot a child.*

The learned judge did not accept Edith's version that the sum of Shs.7,000 was paid for "knowing the home". Edith, of course, later stated that the sum of Shs.7,000 was paid as "njohi ya njurio". The learned judge accepted the version of Mr. Bernard Githiku Njogu and Dr. Kigondu Githaiga who stated that the sum of Shs.7,000 was for the following.

Shs.2,000 for 'njohi ya njurio'

Shs.2,000 for 'mwati na hariba'

Shs.3,000 as part of dowry

The learned judge also accepted the explanation that on account of modern day hurry, as opposed to easier old times, different ceremonies are completed in one day. The learned judge, correctly in our view concluded that the ceremony which took place on 21st December, 1991 was in substance a celebration of marriage between Rebecca and Charles and that the fact of them living together as husband and wife was according to custom and that this was supported by the evidence that the sum of Shs.7,000 partly represented "mwati na hariba" and part of the dowry. Mr. Kamonde for Edith argued that as the intention

of the parties was to have a church wedding there was no valid customary marriage. That argument cannot be correct. A customary marriage is recognized by our system of law as valid marriage. If the parties thereafter go through a church ceremony or say a registration ceremony the marriage becomes a monogamous one but the original customary marriage remains valid.

Mr. Kamonde's main argument was that what happened on 21st December, 1991 was merely a meeting not amounting to any customary marriage. But that cannot be correct. The handing over of money for "mwati na hariba", beer for clansmen, payment of part of the dowry and declaration of "uthoni" show that all essential formalities of Kikuyu customary marriage were completed. Then followed cohabitation, the birth of a child and the naming of the child after his grandfather which are factors which show that a ceremony of marriage did in fact take place. As pointed out earlier, non-payment of the balance of dowry does not invalidate a marriage. Such payment can be made much later. "Mwati ya Kiria" can come later.

Mr. Kamonde also argued that there could have been no presumption of marriage in view of the short period of cohabitation between the parties. He relied upon the case of *In re Sheppard George v. Thyer* (1904) CH.602 in support of his argument. That case turned on long-continued cohabitation (30 years) between the parties as man and wife. Mr. Kamonde's argument was that a mere three year cohabitation could not allow for presumption of marriage. That is certainly so, if it were merely a case of 3 year cohabitation but the position is quite different where the cohabitation follows the performance of essential Kikuyu customary marriage ceremonies. In any event, the learned judge has succinctly dealt with this point and we need not repeat here what the learned judge said. Suffice it to say, that all the surrounding circumstances raised more than a presumption of marriage. Indeed, they pointed to a proper Kikuyu customary marriage having taken place.

Charles was collecting rent for seven rooms in Blue Eating House as his share of his father's estate. The respondent is entitled to that income for her life-time after which interest therein will pass on to her son. We see no reason to differ with the learned judge when he assessed the rental income from the said seven rooms as equivalent to one third of the rental income of the building. In the result, we dismiss this appeal with costs

. Dated and delivered in Nairobi this 1st day of July, 1998

A.M. AKIWUMI

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

A.A. LAKHA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.